IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPLICATION NO.2 OF 1999
IN
REFERENCE APPLICATION NO.F/RA/35/98 BOM
IN
APPEAL NO.E/612/92-BOM

M/s.Vanaz Engineering Ltd.
Unit No.III, Sadavali, (Deorukh),
Tal. Sangameshwar,
Dist. Ratnagiri. ..Applicant

Versus

1. The Commissioner of Central
Excise, P.M.C.Building,
Hirabaug, Tilak Road,
Pune - 411 002.

2. Union of India,
Aykar Bhavan, Marine Lines,
Bombay-20. ..Respondents

Mrs.Sahityalaxmi S.Deshpande for the Applicant.
Mr.R.V.Desai, Senior Advocate, with Mr.P.S.Jetly for the Respondents.

CORAM :- DR.S.RADHAKRISHNAN &
J.P.DEVADHAR,JJ.

DATE : 8TH FEBRUARY,2007

JUDGMENT (PER : DR.S.RADHAKRISHNAN,J.)

1. The Applicant/Petitioner, aggrieved by the Judgment and Order of the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as CEGAT) dated 12th May 1998, refusing to refer has filed this Application under Section 35G of the Central Excise Act, 1944, (hereinafter referred to as 'the Act') to this Court requesting this Court to

direct the Tribunal to refer this case with the relevant substantial questions of law.

2. The facts necessary to decide this application are as follows: M/s Vanaz Engineers, the Petitioner, is engaged in the manufacture and repairs of various types of valves. In April 1983, the Petitioner was manufacturing and supplying click-on gas valves to various Oil Corporations for their LPG cylinders. The design of the click-on gas valves was modified and therefore as per the Works Order, the Petitioner received assignments of old and used gas valves for repairs. The Petitioner had approached the Collector, Central Excise, Pune, for waiving off the condition of producing duty paying documents on the ground that it was not possible to co-relate the duty paying documents with the valves, as the valves re-entering the factory for repairs were old and used and were coming from different destinations. The Collector, Central Excise, Pune, waived off the condition on being satisfied with the reasoning tendered. The Petitioner accordingly repaired the old valves and returned them to consignors. On 7th August,1989, the Petitioner received a Show Cause Notice issued by the Superintendent of Central Excise, on audit observations requiring an explanation with regard to the non-payment of duty of Rs.6,77,857.13. The Petitioner replied to the said Show Cause Notice with written arguments. After considering the Petitioner's

plea, the assistant Collector of Central Excise was pleased to order the withdrawal of the Show Cause Notice. The Assistant Collector of Central Excise filed an appeal under Section 35E of the Central Excise Act. The Collector, Central Excise (Appeals) was pleased to allow the appeal holding,

a) the reason, i.e. goods which are brought back for repairs is not covered by Rule 173H, of Central Excise Rules, and

b) duty paying documents were not produced.

3. Aggrieved thereby the Petitioner had filed an appeal before the CEGAT, Mumbai. The appeal was dismissed on the grounds of non-production of duty paying documents. Subsequently, a reference was made under Section 35G of the Act which was dismissed by the Hon'ble Division Bench of the CEGAT by order dated 12th May,1998, hence this application has been filed by the Petitioner, seeking a Reference.

4. The learned Counsel Mrs.Deshpande on behalf of the petitioner submitted that the CEGAT ought to have allowed the reference application to the High Court on the various substantial questions of law on which reference was sought.

. The following are the substantial questions of law -

a) Whether the process of repairing the old, used and rejected valves could be termed as Manufacture within the meaning of Section

2(F) so as to attract imposition duty under the Central Excise Act, 1944?

b) Whether waiver of production of duty paying documents under Rule 51A by the Collector, Central Excise, Pune after considering the Petitioners case under his order dated 23rd May,1984 was proper and legal and whether subsequent questioning of the non-payment of duty by issuance of demand-cum Show Cause Notice was legal and proper?

c) Whether in view of the fact that after the repairs of old, used valves, no new product emerged and the valves within the same tariff entry, the ratio laid down by the Hon'ble Supreme Court in Delhi Cloth Mills vs. Union of India case ought to have been applied to the present case and whether the levy of excise duty ought to have been held illegal and improper ?

d) Whether the Collector, Central Excise, Pune was armed with power to waive the condition of producing duty paying documents under the provisions of Rule 173H in the peculiar circumstances of the case as the defective, old and used valves were sent to the petitioners for repairs from various sources such as LPG filing plants/depots and cylinders manufacturers of petroleum corporations and it was difficult to co-relate and produce in case of old , used valves with the duty paying documents? and whether in such circumstances marking on the valves ought to have been held to be the sole criteria to decide whether the goods were cleared by the factory?

e) Whether the condition in the first proviso to Rule 173 as regards the limitation of one year for bringing the goods of which duty is paid to the factory for remake, refining, reconditioning, repairing or subjecting them to similar process could be applied retrospectively as the same proviso came into existence on 11.9.1990?

f) Whether the levy of duty on valves which could be repaired or which were not subjected to any process of even repairs was justified?

g) Whether permission from the Collector under Rule 173H was necessary in view of the fact that the said condition was inserted in September 1990 in the Central Excise Rules,

1944?

h) Whether or not from the D-3 intimations produced by the Petitioner it could be inferred that old, used valves were brought to the factory for repairs? and whether the markings on the valves were sufficient to prove the same?

i) Whether the case law cited was properly appreciated and applied to the present case?

j) Whether entire charges for modification and repair which included cost of duty paid items , could amount to value of the valves for determining rate of duty?

k) Whether the benefit under Rule 51A accorded by the Collector was continuing and the Petitioner was entitled to enjoy the benefit of the concession in view of the fact that non-production of duty paying documents was not supported from the authorities at any time and that the Collector had used his judicious discretion while granting concession, appreciating the reasons put forward by the Petitioners?

5. The learned Counsel for the Petitioner submitted as under :-

a) The quantity of valves received for repairs and returned to the consignor, even taking Rs.12.25 as assessable value of each unit for the sake of argument the assessable value for quantity of 22,150 duly repaired and returned valves works out to Rs.25,98,837.50 duty at the rate of 15% ADV + 5% SED comes to Rs.4,09,316.90 (Basic Excise Duty + Special Excise Duty) deducting the duty paid on components used for replacements i.e Rs.1,16,279.13 from the same it comes to Rs. 2,93,048.77 and thus the total duty liability could not be in any case be Rs.6,77,857.13.

b) The unit cost worked out is taken as Rs.12.25 which includes other cost of Rs.5.63 which includes cost of components manufactured and used on which the Petitioner has already paid duty and the cost of components purchased from the market.

c) In view of the fact that at no stage of proceeding commencing from the issue of the Show Cause Notice dt. 7.9.89 till the Tribunal's order dt.26.12.1997 vis-a-vis dt. 30.10.98 the Department had any disputes on the facts that Petitioners brought into their factory the used and old LPG cylinder valves for inspection/testing and repairs wherever warranted in accordance with the permission which the Collector, Central Excise, Pune granted to the Petitioners on 28.5.1984 and with the pre knowledge of the jurisdictional officers for entry of the said goods into their factory, the application seeking reference ought to have been allowed.

d) In view of the fact that the Department never disputed that the Petitioners had manufactured and supplied the LPG cylinder valve/regulator exclusively to specify Public Sector Oil Companies and not to any other buyers, the Learned CEGAT ought to have held that the goods entering the factory for repairs were goods on which duty was paid and ought to have held that the Collector was right in waiving the condition of producing duty paying documents.

6. The Petitioner's application sought reference to this Court on the abovementioned substantial questions of law was dismissed by the CEGAT (vide order dated 12th May,1998) as it did not find any substantial question of law involved in the above, to make a reference to this Court.

7. The CEGAT stated that questions (a), (c), (d) and (f) proceeded on the assumption that what was brought in the Petitioner's factory were old valves. The Tribunal was of the view that as these questions were based on assumptions that could not be established before the Tribunal, there could be no reference made with regards to these questions.

8. As regards questions (b), (h) and (k), the CEGAT relied on Rule 51A which provides that except as otherwise provided in the Rules, no duty paid goods shall be allowed to enter or be retained in any factory. The proviso to that Rule empowers the Collector or Board to permit duty paid goods to enter or be retained in any factory. The Tribunal stated that neither the Rule nor the proviso specified or implied that the Board or the Collector could waive the production of duty paying documents. However, CEGAT was of the opinion that by the emphasis on the payment of duty it implied that such documents were required to be produced.

9. The Tribunal held that question (d) was clearly a question of fact, and not a question of law. Whereas, question (e) was not pressed by the learned Counsel for the Applicant.

10. With relation to question (g) the Tribunal stated that sub-rule (1) of Rule 173H itself permits bringing into the factory goods on which duty has been paid and thus a basic condition inherent to go show payment of duty. This was made explicit by the condition notified by the Collector in purview of the Rule, and hence it was held by the Tribunal that the answer to the question was obvious and did not call for reference.

11. It was further held that question (h) was also purely a question of fact. The Tribunal, while deciding on question (i) held that it related to a case law whose decision did not appear to have been cited. Further, the CEGAT held that there was nothing to show that question (j) was raised at all.

12. In light of the abovementioned reasons, the Tribunal dismissed the application as it did not find any merit in the same.

13. After hearing both the sides, and on a perusal of the original judgment and order of CEGAT, dated 10th November,1997 it is explicitly clear that there are no substantial question of law involved in the above, it is only a case of finding of fact, as is apparent from the following observation in the above order :-

> "As it is worded, both before and amendment, it permits a manufacturer to bring into his factory goods on which duty has been paid. Therefore it is evident that the rule both before and after amendment requires that it must be established that the goods which are coming in are those on which duty has been paid. This condition has not been satisfied. Neither the gate passes, nor other evidence to show that the goods have been cleared on payment of duty has been produced. The contention that the goods were manufactured by the Appellant and cleared by it, as its marking on the valves show, and therefore must be considered to have been cleared on payment of duty clearly assuming something which the rule requires must be established, and is thus

> unacceptable. Therefore the order of the Collector, finding against the Appellant on this single point in the Appeal has to be upheld."

14. In the above, it is clear that the Petitioner could not produce the duty paid documents and also could not establish the identity of goods wherein duty was paid.

15. Under the aforesaid facts and circumstances, it is clear that the above case involves only finding of fact and there is no substantial question of law involved.

16. The above Central Excise Application stands dismissed.

(DR.S.RADHAKRISHNAN,J.)

(J.P.DEVADHAR,J.)